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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SKYYLR FRANK HAMILTON,

Defendant and Appellant.

D058735

(Super. Ct. No. SCN268019)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy M. Casserly, Judge. Affirmed.

A jury convicted Skyylr Frank Hamilton of attempted murder (Pen. Code, §§ 187, 664)¹ (count 1); violence to prevent a person from leaving a gang (§ 186.26, subd. (c)) (count 2); assault with a deadly weapon (§ 245, subd. (a)(1)) (count 3); battery with serious bodily injury (§ 243, subd. (d)) (count 4); participation in a criminal street gang (§ 186.22, subd. (a)) (count 5); and giving false information to a peace officer (§ 148.9,

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

subd. (a)) (count 6). As to counts 1 through 4, the jury made true findings that Hamilton (1) committed the crimes to promote a criminal street gang (§ 186.22, subd. (b)(1)); (2) personally used a deadly weapon (§§ 1192.7, subd. (c)(23), 12022, subd. (b)(1)); and (3) personally inflicted great bodily injury (§§ 1192.7, subd. (c)(8), 12022.7, subd. (a)). Hamilton admitted a prior strike.

The trial court sentenced Hamilton to a prison term of 33 years four months.

Hamilton contends (1) that the trial court abused its discretion in admitting certain testimony by an expert on Hispanic criminal street gangs; (2) insufficient evidence supports the verdicts on counts 1, 2 and 5 and the true findings on the gang enhancement; and (3) the punishment for the gang enhancement with respect to count 2 (preventing a person from leaving a gang in violation of § 186.26, subd. (c)) should have been stricken because it is a lesser included offense of the substantive crime. We find no merit to Hamilton's arguments, and accordingly we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of Hamilton's stabbing of Jose Barrera in September 2009.

Hamilton and Barrera were both members of the Varrios Fallbrook Locos criminal street gang (VFL). Sometime in 2008, Barrera spoke with Hamilton on the telephone and told Hamilton that he wanted to quit the gang because he was going to become a father. Hamilton told Barrera that he was "lame," and that he was going to "check" him or "jump" him.

The next time Barrera had contact with Hamilton was on July 4, 2009, when Hamilton and two other VFL gang members — "Sad Boy" and "Little Vago" — appeared outside Barrera's house. Sad Boy said something to Barrera such as, "If you're from the hood, you're backing up the hood," and then the three gang members attacked Barrera by hitting him in the face, head and stomach. The fight ended when Barrera's mother came outside.

Barrera testified that he likes to fight, but he was mad at Hamilton and the others who assaulted him on July 4, 2009, because they disrespected him by beating him up in front of his family members.

At the end of July 2009, Barrera learned that Hamilton was nearby, and Barrera challenged him to a fight because he was unhappy about the July 4th assault. On that day, Barrera and Hamilton engaged in a lengthy fist fight watched by some of Barrera's friends and two of Hamilton's friends, who are VFL members, including Little Vago. Barrera won the fight when Hamilton capitulated after Barrera knocked him down. At the end of the fight, Hamilton told Barrera that if he wanted to continue fighting, he should bring some knives, and told him to watch out because he was going to stab him.

On the night of September 28, 2009, Barrera was walking home when he encountered Hamilton and Little Vago. Earlier that day, Barrera had talked to Little Vago and made it clear that he wanted to fight Hamilton again. As Barrera described the encounter that night, while Hamilton and Barrera talked about where they were going to fight, Hamilton unexpectedly stabbed Barrera twice in the torso. Hamilton and Little Vago then ran away. Barrera lifted up his shirt, saw tissue protruding from one of his

stab wounds and fell to the ground. A witness who viewed the stabbing from a distance stated to the police that he heard Hamilton state, "I'm going to kill you" *before* he stabbed Barrera, but at trial that witness testified that he heard Hamilton say "I'm going to kill you next time" *after* he had stabbed Barrera.

Barrera had surgery to repair a laceration to his colon caused by a stab wound to his lower left torso that was approximately three inches deep. Doctors dressed a second stab wound, which was on Barrera's left flank and was not as deep, and Barrera was hospitalized for a week.

Barrera spoke to a police detective shortly after the stabbing. When asked about the dispute between him and Hamilton, Barrera explained, "I used to bang the hood before" and "that fool got mad 'cause I stopped backing it up." Barrera explained, "He's all getting all pissed" "[c]ause that fool still wanted me to bang the hood." Barrera told the detective that a high ranking gang member gave him permission to leave the gang, but Hamilton still had a problem with Barrera quitting because "[h]e thinks he's the shit, he thinks like he's . . . a hardcore banger."

When police apprehended Hamilton approximately a week after the stabbing, he gave a false name and a false address.

Hamilton was tried for attempted murder (§§ 187, 664) (count 1); violence to prevent a person from leaving a gang (§ 186.26, subd. (c)) (count 2); assault with a deadly weapon (§ 245, subd. (a)(1)) (count 3); battery with serious bodily injury (§ 243, subd. (d)) (count 4); participation in a criminal street gang (§ 186.22, subd. (a)) (count 5); and giving false information to a peace officer (§ 148.9, subd. (a)) (count 6).

The jury convicted Hamilton on all counts and made true findings — with respect to counts 1 through 4 — that Hamilton (1) committed the crimes to promote a criminal street gang (§ 186.22, subd. (b)(1)); (2) personally used a deadly weapon (§§ 1192.7, subd. (c)(23), 12022, subd. (b)(1)); and (3) personally inflicted great bodily injury (§§ 1192.7, subd. (c)(8), 12022.7, subd. (a)).

II

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Admitting the Testimony of the Gang Expert*

Hamilton argues that the trial court abused its discretion by admitting certain testimony by Deputy Sheriff James Cady, who testified as an expert on Hispanic criminal street gangs.

By way of background, we observe that Deputy Cady's testimony covered subjects such as the concept of gang members gaining respect through the use of violence and fear, and the concept of one gang member "checking" or assaulting another member of the gang who is out of line or tries to leave the gang. Among other things, Deputy Cady testified that he would expect a gang member to be assaulted if he tried to leave the gang, and that he would expect a gang member who is beaten up in front of other gang members to retaliate to "make face."

The trial court recognized defense counsel's standing objection to Deputy Cady's testimony on two bases: (1) that it was unduly prejudicial and should therefore be excluded under Evidence Code section 352, and (2) that it violated Hamilton's rights

under the Confrontation Clause of the Sixth Amendment to the United States Constitution (*Crawford v. Washington* (2004) 541 U.S. 36, 50). In the course of Deputy Cady's testimony, the trial court overruled several of defense counsel's objections, but it did grant a motion to strike two of Deputy Cady's statements, and informed the jury that those statements were stricken and not to be considered. First, the trial court instructed the jury not to consider Deputy Cady's statement, made in the course of opining that Hamilton was a hard core gang member, that "[a]ll the acts he makes are . . . for the gang." Second, the trial court instructed the jury not to consider Deputy Cady's testimony that if a gang member loses a fist fight, he is probably going to come back and retaliate by using a weapon.

Hamilton's argument as to why the trial court abused its discretion in admitting Deputy Cady's testimony is vague and undeveloped. In his opening appellate brief, Hamilton discusses Deputy Cady's testimony, points out some of the testimony to which defense counsel objected and explains the legal principles applicable to the admission of expert testimony. Hamilton's legal discussion focuses on the circumstances in which the trial court should exclude *hearsay evidence* that an expert attempts to introduce as the basis for his expert opinion, citing the Confrontation Clause and Evidence Code section 352.

Despite the fact that Hamilton focuses his general legal discussion on the Confrontation Clause and purported prohibitions against expert witnesses reciting hearsay evidence, Hamilton fails altogether to identify *any* hearsay evidence recited by Deputy Cady during his testimony, and our review of the record reveals none. The most

specific basis for Hamilton's argument is set forth in the reply brief. Hamilton relies on Deputy Cady's explanation that he developed his expertise in Hispanic criminal street gangs over his lengthy law enforcement career by speaking with gang members, "while in a custody setting, discuss[ing] their lifestyles, habits[,] what landed them in detentions, and[,] as a patrol deputy, investigating gang crimes," and that his education as a gang expert included "shar[ing] thoughts, ideas [and] intelligence with other officers and deputies" in addition to benefiting from formal classes and training materials.

However, none of the out-of-court statements that Deputy Cady used to educate himself on criminal street gangs were described at trial, and therefore Hamilton cannot base his argument on the premise that hearsay evidence was improperly admitted. Further, even had any out-of-court statements been recited by Deputy Cady as a basis for his opinion, they would offend the Confrontation Clause *only* if they were testimonial statements. As our Supreme Court recently explained in the plurality opinion in *Williams v. Illinois* (2012) 132 S.Ct. 2221 (*Williams*), an out-of-court statement is testimonial if it has "the primary purpose of accusing a targeted individual of engaging in criminal conduct" and, usually, it involves a "formalized statement[]" such as affidavits, depositions, prior testimony, or confessions."² (*Williams*, at p. 2242.) Here, the out-of-

² Justice Thomas, whose concurrence in the result completed the five justice majority decision in *Williams*, was of the opinion that an out-of-court statement is not testimonial *unless* it involves formalized testimonial materials or statements resulting from formalized dialogue, and that the declarant must also "primarily intend to establish some fact with the understanding that his statement may be used in a criminal prosecution." (*Williams, supra*, 132 S.Ct. 2221, 2261, conc. opn. of Thomas, J.)

court statements that Deputy Cady described as constituting part of his education in criminal street gangs were not described as statements accusing an individual of criminal conduct or as formalized statements, and therefore, without more, would not be testimonial even if they were recited by Deputy Cady at trial.

Hamilton also vaguely argues that the trial court abused its discretion by admitting Deputy Cady's testimony because it was unduly prejudicial under Evidence Code section 352.³ However, Hamilton does not identify the specific testimony to which he refers. The totality of Hamilton's substantive argument consists of (1) an argument heading asserting that "the court abused its discretion in admitting the unduly prejudicial gang evidence" (capitalization omitted), and (2) the statement that "[b]ecause much of Cady's testimony was of improper opinions, based on little more than speculation, or on unduly prejudicial hearsay, or on testimonial evidence that violated appellant's confrontations rights, the court abused its discretion in admitting such evidence."

Such vague and undeveloped argument, without citation to specific testimony, is insufficient to carry Hamilton's appellate burden. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1227-1228 [reviewing court "not required to scrutinize the . . . record" to find support for counsel's assertions]; *People v. Stanley* (1995) 10 Cal.4th 764, 793 [it is not

³ Under Evidence Code section 352, the trial court may "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Ibid.*)

the role of reviewing court to independently seek out support for appellant's conclusory assertions, and such contentions may be rejected without consideration].)

Courts "have long permitted a qualified expert to testify about criminal street gangs when the testimony is relevant to the case. ' . . . The subject matter of the culture and habits of criminal street gangs, of particular relevance here, meets this criterion.'" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) The expert may express his opinions by responding to hypothetical questions drawn from the facts of the case, even if the opinion embraces some of the ultimate issues to be decided by the jury. (*People v. Vang* (2011) 52 Cal.4th 1038, 1045-1052.) Within these guidelines, "[t]rial courts exercise discretion in determining both the admissibility of evidence under Evidence Code section 352 [citation] and a witness's expert status [citation].'" (*Gonzalez, supra*, 38 Cal.4th at p. 944.) Despite the fact that Hamilton has not specifically identified the portions of Deputy Cady's testimony that he believes should have been excluded under Evidence Code section 352, we have independently reviewed the entirety of Deputy Cady's testimony. Deputy Cady's testimony was properly admitted, as it concerned the culture and habits of criminal street gangs and was expressed through properly formed hypothetical questions. The testimony was relevant to the issues presented at trial and was not unduly prejudicial. Therefore, the trial court was not required to exclude Deputy Cady's testimony pursuant to Evidence Code section 352.

B. *Substantial Evidence Supports the Verdicts Against Hamilton on Counts 1, 2 and 5, and the True Finding on the Gang Enhancement*

We next consider Hamilton's contention that insufficient evidence supports the convictions on counts 1, 2 and 5, and the true finding on the gang enhancement for each of the counts to which it applied.

1. *Standard of Review*

In considering a challenge to the sufficiency of the evidence, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. . . . We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. . . . If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. . . . 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.'" (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*), citations omitted.)

2. *Substantial Evidence Supports the Attempted Murder Conviction*

Hamilton contends that insufficient evidence supports his conviction for attempted murder because the evidence does not support a finding that he acted with the specific intent to kill.

It is well-established that "'the crime of attempted murder requires a specific intent to kill . . .'" (*People v. Guerra* (1985) 40 Cal.3d 377, 386), and the jury was instructed accordingly.

Here, the record contains substantial evidence from which a reasonable juror could conclude that Hamilton intended to kill Barrera, rather than merely injure him.

First, Hamilton engaged in the life-threatening act of stabbing the left side of Barrera's torso two separate times. Although the first stab wound, which perforated Barrera's colon, would have been sufficient had Hamilton merely intended to hurt Barrera, Hamilton chose to try to inflict more serious injury by stabbing Barrera again before running away.

Second, a witness to the stabbing told the police on the night of the incident that *before* Hamilton stabbed Barrera, he stated "I'm going to kill you." Although that witness changed his story at trial, and testified that Hamilton stated "I'm going to kill you next time" *after* he had stabbed Barrera, the jury was entitled to credit the witness's statement to the police. Indeed, the jury could reasonably have concluded that the statement that the witness made on the night of the incident was more accurate because (1) the witness testified that he was unsure of whether his recollection of the statement at trial was more accurate than his recollection on the night of the crime; (2) he testified that he had tried his best to tell the police the truth during the interview; and (3) evidence was presented that the witness could have had a motive to slant his trial testimony in favor of Hamilton as Hamilton had a close relationship with the witness's sister.

Hamilton's challenge to the sufficiency of the evidence for the attempted murder conviction is, therefore, without merit.

3. *Substantial Evidence Supports a Finding That Hamilton Used Violence to Prevent Barrera from Leaving the Gang*

Based on his stabbing of Barrera in September 2009, Hamilton was convicted in count 2 pursuant to section 186.26, subdivision (c), which makes it a crime to "use[] physical violence to . . . prevent [a] person from leaving a criminal street gang." (*Ibid.*) Hamilton contends that insufficient evidence supports a conviction under that provision because the jury could not reasonably have concluded that his stabbing of Barrera was directed at preventing Barrera from leaving the VFL gang. As we will explain, we disagree.

The strongest evidence of Hamilton's motive for the stabbing was from Barrera's statements to the police shortly after he was stabbed. As we have explained, Barrera stated to the police that Hamilton was mad at him "[c]ause that fool still wanted me to bang the hood," and had a problem with Barrera leaving the gang, despite permission from a high ranking gang member, because "[h]e thinks he's the shit, he thinks like he's . . . a hardcore banger." Consistent with this explanation of Hamilton's motives, Barrera testified that when he told Hamilton that he was leaving the gang, Hamilton told him that he was "lame" and that he was going to "check" him or jump him.⁴

⁴ Barrera testified that he understood the use of the term "lame" to refer to the fact that "I got out of the hood because I don't want to be in the hood no more." Deputy Cady explained that in the terminology used by gangs, "[w]hen you're lame . . . you're not in

Further, Barrera explained that when he was assaulted for the first time by Hamilton and the other gang members on July 4, 2009, one of the assailants stated something such as "If you're from the hood, you're backing up the hood," which implied that the assault was because Barrera was leaving the gang. A reasonable juror could infer that the subsequent stabbing was based on the same motivation.

As additional evidence supporting a finding that Hamilton acted violently toward Barrera to prevent him from leaving the gang, Deputy Cady testified that a gang member is a member for life and that a gang member could expect to be assaulted if he tried to leave a gang.

Based on all of the above, the record contains substantial evidence that Hamilton used physical violence on Barrera in September 2009 to prevent him from leaving the VFL gang.

4. *Substantial Evidence Supports a Finding That Hamilton Participated in a Criminal Street Gang*

In count 5, Hamilton was convicted of actively participating in a criminal street gang in violation of section 186.22, subdivision (a) based on the events of September 28, 2009.

Specifically, section 186.22, subdivision (a) applies to "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers,

good standing with the gang," and the term "checking" refers to authorization of an assault based on a gang member's actions "that's not viewed by the gang as being okay."

or assists in any felonious criminal conduct by members of that gang." (*Ibid.*) "[A] violation of section 186.22[, subdivision](a) is established when a defendant actively participates in a criminal street gang with knowledge that the gang's members engage or have engaged in a pattern of criminal activity, and willfully promotes, furthers, or assists in *any* felonious criminal conduct by gang members." (*Albillar, supra*, 51 Cal.4th at p. 54.) The operative information and the verdict form both specified that Hamilton was being charged under section 186.22, subdivision (a) based on his conduct on or about September 28, 2009, i.e., the date on which he stabbed Barrera.

Hamilton argues that insufficient evidence supports a finding that his criminal conduct on September 28, 2009, was related to his status as a gang member, and that instead, his fight with Barrera was based solely on personal animosity. Based on this premise, Hamilton argues that the evidence does not support a finding that he actively participated in a criminal street gang premised on his conduct on September 29, 2009.

We disagree. As we explained when discussing Hamilton's challenge to his conviction on count 2, substantial evidence supports a finding that Hamilton committed the stabbing because Barrera wanted to leave the gang. Other evidence also supports a finding that the stabbing was gang related. Deputy Cady opined that Hamilton was a "hardcore" gang member. He explained that gangs operate by committing acts of violence to instill fear, and that members gain respect by committing acts of violence. Deputy Cady also explained that if a gang member is beaten up in front of other gang members, as occurred to Hamilton here, that gang member would be expected to retaliate to maintain respect. Also supporting the gang-related nature of the incident was the fact

that Hamilton was not alone during the stabbing, but was backed up by another VFL member, Little Vago.

Based on the foregoing, a reasonable juror could conclude that Hamilton's stabbing of Barrera was gang related. Therefore, Hamilton's challenge to the sufficiency of the evidence of the conviction for active participation in a criminal street gang is without merit.

5. *Substantial Evidence Supports a True Finding on the Gang Enhancement*

Finally, we consider Hamilton's challenge to the sufficiency of the evidence to support a true finding on the gang enhancement under section 186.22, subdivision (b)(1) for counts 1 through 4. That sentencing enhancement applies to "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (*Ibid.*) "[S]ection 186.22[, subdivision](b)(1) encompasses the specific intent to promote, further, or assist in *any* criminal conduct by gang members — including the current offenses" (*Albillar, supra*, 51 Cal.4th at p. 65.)

Based solely on his incorporation of the arguments that he made with respect to the sufficiency of the evidence to support a conviction on counts 2 and 5, Hamilton argues that insufficient evidence supports a finding that in committing the crimes charged in counts 1 through 4, he acted with the specific intent to promote criminal conduct by gang members.

As we have explained above with respect to counts 2 and 5, we reject Hamilton's contention that the evidence shows nothing more than a stabbing based on personal animosity. On the contrary, a reasonable juror could conclude based on the evidence presented at trial that Hamilton's stabbing of Barrera was gang-related conduct, which was committed to prevent Barrera from leaving the gang, enhance the gang's reputation for violence, and help Hamilton maintain the respect he required as a member of the gang. Therefore, we conclude that substantial evidence supports the finding that Hamilton's commission of the crimes in counts 1 through 4 was with the specific intent to promote criminal conduct by gang members.

C. *The Trial Court Was Not Required to Strike the Gang Enhancement on Count 2*

When sentencing Hamilton on count 2 for the substantive offense of using violence to prevent a person from leaving a gang, the trial court imposed a five-year prison term, which it stayed under section 654 in favor of the sentence imposed for count 1. With respect to the gang enhancement for count 2, based on the true finding under section 186.22, subdivision (b)(1) the trial court imposed a 10-year term, which it also stayed pursuant to section 654.

Hamilton contends that the correct approach would have been for the trial court to strike rather than stay the gang enhancement on count 2 because the gang enhancement is a lesser included offense of the substantive offense of using violence to prevent a person from leaving a gang.

Hamilton's argument relies on the rule prohibiting the conviction of both a greater and lesser included offense. Under this rule, "[a] judicially created exception to the

general rule permitting multiple conviction "prohibits multiple convictions based on necessarily included offenses." [Citation.] "[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." (*People v. Sloan* (2007) 42 Cal.4th 110, 116.) Hamilton argues that someone cannot commit the crime of using violence to prevent someone from leaving a gang without also satisfying the elements for a true finding of a gang enhancement under section 186.22, subdivision (b)(1), and thus the gang enhancement is a necessarily included offense of the substantive crime.

We reject Hamilton's argument because the imposition of a sentence enhancement is not the same thing as a conviction for a substantive offense for the purposes of the rule prohibiting multiple convictions of necessarily included offenses. In *People v. Izaguirre* (2007) 42 Cal.4th 126, 130 (*Izaguirre*), our Supreme Court rejected the same argument that Hamilton makes here, namely that "conduct enhancements must be treated like necessarily included offenses for purposes of the multiple conviction rule" so that "*enhancements themselves . . . are subject to being struck under the multiple conviction rule.*" (*Id.* at p. 130.) As our Supreme Court explained in rejecting the argument, "[c]onduct enhancements cannot be imposed standing alone as additional punishment. By definition, an enhancement is 'an additional term of imprisonment added to the base term.' [Citations.] For that reason alone, an enhancement cannot be equated with an offense." (*Id.* at p. 134.) Based on *Izaguirre*'s explicit rejection of the same argument

presented here, we conclude that Hamilton has not established that the trial court was required to strike the gang enhancement imposed for count 2.⁵

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.

⁵ Explaining that even if we were to accept Hamilton's argument, it would have no practical impact on the length of the sentence Hamilton will serve, the Attorney General did not provide us with briefing on the issue of whether the gang enhancement should have been stricken in count 2, electing instead to "respectfully submit" the matter for our consideration. In our independent research, we discovered *Izaguirre, supra*, 42 Cal.4th 126, which the Attorney General easily could have cited to us in opposing Hamilton's argument, rather than adopting the unhelpful approach of "submitting" the issue without taking a position.